

SUPREME COURT

OF THE

UNITED STATES

February Term 1800.

Present CUSHING,
PATERSON,
CHASE, and
WASHINGTON, } Justices.

Mossman, surviving Executor, Plaintiff in Error, *versus*
Higginson, surviving Partner, Defendant in Error.

THIS was a writ of error, to remove the proceedings on a bill in equity, from the Circuit Court, for the district of *Georgia*, tested the 27th *November* 1798, returnable on the next. The case, on the bill and pleadings, was, briefly, this:—*Alexander Willy*, an inhabitant of *Georgia*, being indebted to *Higginson* and *Greenwood*, *British* merchants, gave them a bond and mortgage, payable the first of *January* 1773. In the year 1778, *Willy* was banished from the state of *Georgia*, and his estate confiscated by law. The mortgaged premises were seized and sold by the commissioners for forfeited estates, to certain purchasers, who afterwards sold the same to *James Houston*; and the property remained in his possession, or in the possession of his executors, until the 12th of *September* 1796, when it was levied upon, sold, and conveyed to *William Mien*, by the creditors of *Houston*; notice of the mortgage having been given to *Mossman*, the executor of *Houston*, to *Mien*, the agent for his creditors, and to the marshal, before the sale. In *March* 1797, *Higginson*, the surviving mortgagee, filed the present bill to foreclose the equity of redemption, stating himself to be a *subject of Great Britain*; but in no part of the proceedings, were the defendants, or any of them, stated to be *citizens of the United States*. The defendants pleaded the confiscation laws of *Georgia* in bar. and answered
to

to the merits; but WASHINGTON, *Justice*, over-ruled the pleas, 1800. and decreed, that unless *William Mien* paid the principal and interest of the debt, before the 17th of *February* 1799, the equity of redemption should be foreclosed. The merits of the decree were not, however, discussed on the writ of error, but the following points occurred:

I. *Dallas*, for the plaintiff in error, moved to amend the writ, by inserting the return day of the present term in the blank. The writ is regularly tested, and by indorsements it appeared when it was filed below, and when it was filed here. The clerk of the Circuit Court had, also, indorsed, "Returnable to *February* term 1799." There is, therefore, sufficient matter to amend by; and the amendment is within the provision of the act of congress, 1 vol. 72. s. 32.

By the COURT. Let the amendment be made.

II. It was objected by *Ingersoll* and *Dallas*, for the plaintiff in error, that the jurisdiction of the court, did not appear upon the record, as there was no designation of the citizenship of the defendants. 3 *Dall. Rep.* 382. 369. 4 *Dall. Rep. ant.* 8. *Turner v. Enrille*.

It was answered by *E. Tilghman* and *Reed* (of *South-Carolina*) that as no process was prayed against *Willy*, he was not, in legal contemplation, a party to the suit; 1 *P. Wm.* 593. that the prayer of process against *Mossman*, who never held the land, was irregular, and to be regarded as mere surplusage; that there was no pretence to charge *Houston*; and that *Mien*, being expressly stated to be the purchaser of the land, the Court will take notice of the law of *Georgia*, by which no alien can hold real estate; and, by necessary implication, the purchaser must be a citizen. Besides, it is enough under the constitution, the treaty of 1783, and the 11th section of the judiciary act, that an alien is a party to the suit, whose real object is the thing mortgaged, a proceeding *in rem*, and not a personal recovery. At all events, the Court will permit the defect to be amended.

Ingersoll, in reply. The judiciary act was only intended to carry the constitution into effect, and cannot amplify, or alter, its provisions. The constitution nowhere gives jurisdiction (nor has any Judge ever countenanced the idea) in suits between alien and alien. It is not an exception to the rule, that the bill in equity, is in the nature of a proceeding *in rem*: for, there cannot be a foreclosure of the equity of redemption, without a personal suit. It is not like the case of a monition to condemn a prize ship, which is notice to all the world, and no party respondent is requisite; and the supposed inference of citizenship from purchasing land fails, when it is recollected, that the purchase does not fix the use. The jurisdiction of the federal Courts (*Const. art.* 3. s. 2.)

1800. s. 2.) is not where *a question* arises, that may be affected by a treaty, but where *a case* arises under a treaty; and if a question on the validity of a treaty, arises in a state Court, there is a special provision for transferring it to the Supreme Court; 1 vol. 61. s. 22. But, in the present instance, it does not appear that any question can arise under the treaty; for, it is not referred to, directly, nor indirectly, in any part of the record. As to an amendment, there is nothing to amend by. The citizenship of the defendants could only be judicially known, by the admission of the parties, or by evidence of the fact. It is not expressly, or impliedly admitted; and this Court cannot try an issue to ascertain it.

By the COURT: The decisions, on this subject, govern the present case; and the 11th section of the judiciary act can, and must, receive a construction, consistent with the constitution. It says, it is true, in general terms, that the Circuit Court shall have cognizance of suits "where an alien is *a party*;" but as the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits *between citizens and foreigners*, we must so expound the terms of the law, as to meet the case, "where, indeed, an alien is one party," but a citizen is the other. Neither the constitution, nor the act of congress, regard, on this point, the subject of the suit, but the parties. A description of the parties is, therefore, indispensable to the exercise of jurisdiction. There is here no such description; and, of course,

The writ of error must be quashed.

Cooper *versus* Telfair.

ERROR from the Circuit Court for the district of *Georgia*. The record exhibited the following case:

Basil Cooper, at present of the island of *Jamaica*, in the dominions of his *Britannic* majesty, formerly an inhabitant of the state of *Georgia*, brought an action in the Circuit Court of *Georgia* to *November* term 1797, against *Edward Telfair*, of the district of *Georgia*, upon a bond for 1000*l.* sterling, equal to 4285 $\frac{10}{100}$ dollars, dated the 14th of *May* 1774.

After oyer of the bond and condition, the defendant pleaded in bar, 1st. Payment. 2d. "That, on the 4th day of *May* 1782, an act "was passed by the legislature of the state of *Georgia* entitled 'An "act for inflicting penalties on and confiscating the estate of such "persons as are therein declared guilty of treason, and for other purposes therein mentioned,' by which it is, among other things enacted and declared, 'that all and every the persons, named and included in the said act, are banished from the said state; and that "all and singular the estate real and personal of each and every of "the aforesaid persons, which they held, possessed, or were entitled